Supreme Court, U.S.
FILED

98 350 AUG 26 1998

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1997

WILLIAM E. WALKER M.D.,

Petitioner,

v.

THE STATE OF TEXAS, by and through the Board of Regents of the University of Texas System and the University of Texas Health Science Center at Houston; and THOMAS OLLIS HICKS; ELLEN CLARKE TEMPLE; BERNARD RAPAPORT; THOMAS LOEFFLER; ROBERT JAMES CRUIKSHANK; ZAN W. HOLMES, JR.; MARTHA ELLEN SMILEY; LOWELL H. LEBERMANN, JR.; MARIO EFRAIN RAMIREZ M.D.; and M. DAVID LOW M.D.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM E. WALKER, pro se
2831 Sackett St.
Houston, TX 77098
Tel. 713 520-0021
Fax 713 520-0868

QUESTIONS PRESENTED

I

The Fifth Circuit, in conflict with other Circuit courts, interprets the ambiguous removal statute, 28 U.S.C. 1441, to allow removal by third parties.

The United States Supreme Court has held that limiting removal is an important policy, and that ambiguities in the removal statute are to be construed strictly against removal.

Does not the plain meaning of 28 U.S.C. 1441 allowing removal by "the" defendant or defendants, together with the policy of limiting removal, require that removal be available only to the original defendant(s), and not extended to include third-parties?

II

Here, the Fifth Circuit held, further, that "separate and independent" claims of *opposing* parties permit removal by a third-party, under 28 U.S.C. 1441(c).

Does not the plain meaning of the word "join" in 28 U.S.C. 1441(c) require that, to establish removal jurisdiction in a third-party, if such third-party removal be ever permissible, the "separate and independent" claims must be brought by one single party, or by parties aligned together in the lawsuit?

QUESTIONS PRESENTED – Continued

III

In affirming a motion for summary judgment, the Fifth Circuit assumed the factual truth of the movants' allegations, and did not view the facts in a light most favorable to the non-moving party.

Must not a court view the facts in a light most favorable to the non-moving party when adjudicating a summary judgment motion?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINION BELOW 1

JURISDICTION 1

STATUTES INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. The Fifth Circuit's Allowing Third-parties To Remove A Case Is In Direct Conflict With The Seventh And Eighth Circuits And The Vast Majority Of District Courts That Have Considered The Issue. It Is Also Directly Contrary To The Policies Of Limiting Removal Jurisdiction, And Construing Ambiguities In The Removal Statute Against Removal 5

II. The Fifth Circuit's Construction Of The Term "Join" In The Removal Statute, In This Case, Is In Direct Conflict With The Plain Legal Meaning Of The Word 7

III. The Fifth Circuit Adjudicated A Motion For Summary Judgment Without Viewing The Facts In A Light Most Favorable To The Non-moving Party. This Was In Direct Conflict With The Usual Legal Standard For Analyzing Such A Motion 8

CONCLUSION 10

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

American Fire & Casualty Co. v. Finn, 341 U.S. 6, 71 S. Ct. 534, 95 L.Ed. 702 (1951) 7

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986) 8

Butler v. Polk, 592 F.2d 1293 (5th Cir. 1979) 6

Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury, 622 F.2d 133 (5th Cir. 1980) 5, 6

Herron v. Continental Airlines, Inc., 73 F.3d 57 (5th Cir. 1996) 6

Lewis v. Windsor Door Co., 926 F.2d 729 (8th Cir. 1991) 5

Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 1065 S. Ct. 1348, 89 L.Ed.2d 538 (1986) 8

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S. Ct. 868, 85 L.Ed. 1214 (1941) 6

Thomas v. Shelton, 740 F.2d 478 (7th Cir. 1984) 5, 8

STATUTES

28 U.S.C. 1254(1) 1

28 U.S.C. 1441(a) 2, 5, 6

28 U.S.C. 1441(c) 2, 5, 7, 8

OTHER AUTHORITIES

1A Moore's Federal Practice PO. 163 [4. -6] (2d ed. 1995) 5

14A Charles Alan Wright et al., Federal Practice and Procedure 3724 (2d ed. 1985 & Supp. 1994) 5

PETITION FOR WRIT OF CERTIORARI

William E. Walker respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 28, 1998, in order to resolve the conflict between the Fifth Circuit and other Circuit courts over the interpretation of the removal statute, and to re-affirm the legal standard for the adjudication of motions for summary judgment.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is reprinted in Appendix A at page App. 1. The opinion has also been published. *State of Texas v. Walker,* 142 F.3d 813 (5th Cir. 1998).

JURISDICTION

On May 28, 1998, the United States Court of Appeals for the Fifth Circuit issued judgment in the case. No motion for rehearing nor suggestion for en banc consideration was filed.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED IN THIS CASE

28 U.S.C. 1441 provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

STATEMENT OF THE CASE

This case began as an employment contract dispute, under Texas state law, between the State of Texas and Walker, who was at that time a tenured professor at the University of Texas. Because of the Eleventh Amendment, the contract dispute will be tried in a Texas state court, since the State is a defendant.

The contract has not yet been construed by a court of competent jurisdiction, and so the contract dispute is as yet unresolved.

Like most of his colleagues, Walker accepted outside income when he was a professor, and maintains that his employment contract permitted him to do so. The University maintains that the contract does not so provide, and the Regents of the University terminated Walker's tenure, despite a due process tribunal's unanimous finding *in Walker's favor* that there was no ground for termination. The Regents say that the termination was not for accepting the income in the first place, but for Walker's alleged "failure to co-operate in resolving the dispute".

In response, Walker sued the Regents and President of the University of Texas, personally, claiming deprivation of due process and equal protection, and two separate defenses under the bankruptcy code. The Regents were aware of these four separate defenses when they terminated Walker's tenure.

The Regents and President removed in the posture of third-party defendants faced with a "federal question" claim that was "separate and independent." Walker disputed that his claim against the Regents was separate and independent from his claim against the State, since both derived from but one loss to him, the termination of his tenure as a professor at the university.

The District Court sustained a motion for summary judgment by the Regents and President on the grounds of qualified immunity.

The Fifth Circuit denied Walker's complaint that the removal was invalid, holding that his claim against the Regents was separate and independent from the State's claim against him, despite the fact that both were founded in the same contract dispute.

The Fifth Circuit also affirmed the granting of summary judgment for the Regents on qualified immunity grounds, accepting the Regents' interpretation of the contract as correct, and their allegations of Walker's "failure to co-operate in resolving the dispute" as true, and holding, therefore, that the action of the Regents was "objectively reasonable". This was not viewing the facts in the light most favorable to Walker, the non-movant.

Walker disputes the interpretation of the contract, and disputes the allegation of non-cooperation. These remain factual disputes in the case. Both issues are material: if Walker's interpretation of the contract is construed as correct by the Texas state court, the Regents had no claim in the first place; if Walker's cooperation in trying to resolve the dispute is proven to a reasonable factfinder, the Regents' action in dismissing Walker could not have been "objectively reasonable". Walker could thus win either way.

Walker was the non-moving party in the motion for summary judgment, and the facts should have been construed in a light most favorable to him. The Fifth Circuit panel, however, applied a different standard – they took the Regents' mere allegations as true, and did not view the facts in the light most favorable to the non-movant, Walker.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Allowing Third-parties To Remove A Case Is In Direct Conflict With The Seventh And Eighth Circuits And The Vast Majority Of District Courts That Have Considered The Issue. It Is Also Directly Contrary To The Policies Of Limiting Removal Jurisdiction, And Construing Ambiguities In The Removal Statute Against Removal.

The Fifth Circuit allows removal by indemnity third-parties. *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury*, 622 F.2d 133, 135 (5th Cir. 1980). This is in direct conflict with the Seventh Circuit, *Thomas v. Shelton*, 740 F.2d 478 (7th Cir. 1984), and the Eighth Circuit, *Lewis v. Windsor Door Co.*, 926 F.2d 729 (8th Cir. 1991). It is also in direct conflict with the commentators who conclude that removal is available only to the original defendant, and with the vast majority of District courts that have considered the issue. See, e.g., 1A Moore's Federal Practice P0.163 [4. -6] (2d ed. 1995); 14A Charles Alan Wright et al., Federal Practice and Procedure 3724 (2d ed. 1985 & Supp. 1994).

The majority and the commentators follow the initial language of the removal statute that removal is available to "the defendant or the defendants." 28 U.S.C. 1441(a). The courts hold, and the commentators agree, that this means the *original* defendant or defendants, and does not include third-party defendants.

The Fifth Circuit and a minority of District courts have held that "defendant or defendants" in §1441(a) includes third-party defendants, and then go to §1441(c) to allow a third-party defendant to remove when faced

with a "separate and independent" federal question claim.

There is, thus, a distinct ambiguity in §1441(a). Does the "or the defendants" language mean only the original defendants, or does it include third-party defendants? Since "the defendant" must mean the original defendant, a plain reading of the immediately following "or the defendants", in the statute, would mean the original defendants, and invalidate the analysis of the Fifth Circuit and the minority of District courts.

Federal courts must strictly construe the removal statute. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). Removal statutes are strictly construed against removal. *Herron v. Continental Airlines, Inc.*, 73 F.3d 57, (5th Cir. 1996). Doubts as to removability are to be resolved in favor of remanding the case to state court. *Shamrock Oil*, 313 U.S. 100, and see, e.g., *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir. 1979) (it is axiomatic that ambiguities are generally construed against removal).

Here, despite the foregoing authority, the Fifth Circuit recognized that the removal statute is ambiguous with respect to third-parties, Opinion at App. 5, but failed to resolve the ambiguity against removal, extending herein, even further, the anomaly of *Carl Heck Engineers* to include removal by non-indemnity third-parties.

Certiorari should be granted to resolve the split between the Circuits in whether removal is available to third-party defendants, and to reaffirm the policies of strict construction of the removal statute, and resolution

of statutory ambiguities with a presumption against the validity of removal.

II. The Fifth Circuit's Construction Of The Term "Join" In The Removal Statute, In This Case, Is In Direct Conflict With The Plain Legal Meaning Of The Word.

28 U.S.C. 1441(c) provides for removal when a "separate and independent" federal-question claim is "joined" with an otherwise nonremovable claim.

"Join" is the verb from "joinder"; joinder of claims involves the aggregation of claims by one single party, or by parties aligned on the same side of a lawsuit.

Here, the relevant claims "joined", for the purpose of §1441(c), are those of Walker – one in contract against the State of Texas, and one in civil rights against the Regents and President of the university. They are not separate and independent, however, since they involve but one wrong, the loss of Walker's tenure as a professor. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 13, 71 S. Ct. 534, 95 L. Ed. 702 (1951).

The Regents advocated, however, and the Fifth Circuit held, Opinion at App. 8, that the analysis of "separate and independent" depends on a comparison of the State's original claim against Walker with his third-party claim against the Regents and President.

Those claims, however, are not "joined" – they are claims by *opposing* parties. Whether they are separate and independent is irrelevant to §1441(c) jurisdiction, since they are not joined. This difference was articulated clearly

by Judge Posner, writing in *Thomas*, supra. 740 F.2d at 485.

Thus, the Fifth Circuit misinterpreted the plain legal meaning of "join" in §1441(c). The misinterpretation is dispositive as to subject-matter jurisdiction in this case, and such statutory misconstruction invites a grant of certiorari to elucidate the proper statutory construction.

III. The Fifth Circuit Adjudicated A Motion For Summary Judgment Without Viewing The Facts In A Light Most Favorable To The Non-moving Party. This Was In Direct Conflict With The Usual Legal Standard For Analyzing Such A Motion.

In adjudicating a motion for summary judgment, the evidence of the non-mover is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 355, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 1065 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

Here, the Regents and President moved for summary judgment based on qualified immunity. They asserted their action in terminating Walker was "objectively reasonable" because they alleged he had breached the contract and did not co-operate in resolving the contract dispute. Walker asserted that he had not breached, and that he co-operated fully, even offering to settle the dispute.

The Fifth Circuit did not, however, examine the evidence in a light most favorable to Walker, the non-movant, despite a rote recitation in its opinion that it would do so. Opinion at App. 10.

The opinion is replete with language that shows the Court had decided the facts against the non-movant, based on the mere allegations of the moving party – "Walker . . . defied the university and refused to cooperate in resolving the dispute", Opinion at App. 14; " . . . any difference in treatment between Walker and other faculty members was based on distinctions in their factual situations", Opinion at App. 14; and " . . . Walker's acts in breaching his contract and failing to account to UTHSC for his outside earnings", Opinion at App. 24.

Walker disputes that he breached his contract, asserts that he was treated differently than were other professors in identical circumstances, and disputes that he failed to cooperate in resolving the dispute. Had the disputed facts been viewed in a light most favorable to him, the Court would have had to conclude that there was a genuine issue of material fact for trial, and denied the motion for summary judgment.

Indeed, remarkably, the Fifth Circuit opined that "reasonable minds could disagree on the propriety of Walker's termination", suggesting that there was, indeed, a genuine issue of material fact, and that a reasonable factfinder could find in Walker's favor. Opinion at App. 13.

A grant of certiorari is appropriate here to re-affirm the legal standard for the adjudication of summary judgment motions, since the Fifth Circuit applied a standard

radically different from that mandated by United States Supreme Court authority.

CONCLUSION

For all of the foregoing reasons, this petition for writ of certiorari should be granted.

WILLIAM E. WALKER, *pro se*
2831 Sackett St., Houston, TX 77098
Tel. 713 520 0021
Fax 713 520 0868

THE STATE OF TEXAS, by and through the Board of Regents of The University of Texas System and University of Texas Health Science Center at Houston, Plaintiff-Appellant, versus WILLIAM E. WALKER, M.D., Defendant-Third Party Plaintiff, Appellee-Appellant, THOMAS OLLIS HICKS; ELLEN CLARKE TEMPLE; BERNARD RAPAPORT; THOMAS LOEFFLER, ROBERT JAMES CRUIKSHANK; ZAN W. HOLMES, JR.; MARTHA ELLEN SMILEY; LOWELL H. LEBERMANN, JR.; MARIO EFRAIN RAMIREZ, M.D.; M. DAVID LOW, M.D., Third Party Defendants-Appellees.

No. 97-20106

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

142 F.3d 813; 1998 U.S. App. LEXIS 10904; 32 Bankr. Ct. Dec. 826

May 28, 1998, Decided

PRIOR HISTORY: Appeals from the United States District Court for the Southern District of Texas. H-95-CV-4657. Sim T Lake, III, US District Judge.

DISPOSITION: AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

CORE TERMS: Eleventh Amendment, proof of claim, professional fees, removal, treasury, willful, discharged, qualified immunity, malicious injury, immunity, conversion, earned, bankruptcy case, counterclaim, joined, third-party, faculty members, owed, breach of contract, nondischargeability, by-law, well-pleaded, nondischargeable, termination, collecting, waive, consultations, appearances, similarly situated, terminating

COUNSEL: For STATE OF TEXAS, by and through the Board of Regents of the University of Texas System and University of Texas Health Center at Houston, Plaintiff – Appellant: Christopher Norman Johnsen, Lisa M. Nieman, Office of the Attorney General, Austin, TX.

For WILLIAM E WALKER, M D, Defendant – Appellee: William E. Walker, Houston, TX. Anthony P. Griffin, Galveston, TX.

JUDGES: Before DAVIS, JONES, and DENNIS, Circuit Judges.

OPINIONBY: EDITH H. JONES

OPINION:
EDITH H. JONES, Circuit Judge:

This case presents a straightforward employment and contract dispute mired in a procedural thicket. Our task is to untangle the thicket, although, unhappily, we cannot finally resolve the merits. We conclude, first, that the case was correctly removed by University President Low, a counterclaim defendant newly-joined on a "separate and independent claim" for purposes of 28 U.S.C. § 1441(c). Second, the court did not err in shielding the counterclaim defendants from Walker's § 1983 claims on qualified immunity grounds. Third, Walker's debt to the state for fees he owed before he filed for bankruptcy relief is dischargeable post-Seminole, although whether it is nondischargeable under 11 U.S.C. § 523(a)(6) is a question left to be addressed on remand.

I. Background

Dr. Walker was a heart surgeon and a tenured faculty member at the University of Texas Health Science Center at Houston ("UTHSC"). As a condition of his employment, Walker joined the Medical Services, Research, and Development Plan ("MSRDP") by executing the standard MSRDP contract in 1980. The MSRDP contract required Walker to remit all professional fees he earned to the University of Texas ("University"). The MSRDP's by-laws define professional fees in part as fees for all court appearances, depositions, or legal consultations. During the period of his employment at UTHSC, Walker received substantial fees for court appearances, depositions, and legal consultations, but he never remitted any of them to the University. When Walker's noncompliance with the MSRDP came to the attention of the University, it investigated Walker's and other faculty members' personal retention of professional fees. Walker and the other faculty members denied that they retained fees in violation of the MSRDP. After attempts to settle the resulting contractual disagreement failed, Walker was terminated by the Board of Regents of the University of Texas System in August 1994.

Prior to his termination, Walker filed for bankruptcy relief under Chapter 7 on September 1, 1992. His debts were discharged by the bankruptcy court on January 19, 1993. The University was not identified as a creditor in Walker's no-asset bankruptcy filing, and it did not file a proof of claim.

In February 1995, the State of Texas, by and through the Board of Regents of the University of Texas System

and UTHSC ("State"), filed suit against Walker in state court. The State alleged conversion and breach of contract and sought an accounting of the fees retained by Walker. Walker counterclaimed against the State, made additional claims against the Regents in their individual capacities ("Regents"), and impleaded as an additional defendant UTHSC's president, M. David Low, in both his official and individual capacities. Walker alleged state tort and breach of contract claims, as well as substantive due process and equal protection claims pursuant to 42 U.S.C. § 1983, all of which were related to his allegedly improper termination.

The counter-defendants removed this case to federal court pursuant to 28 U.S.C. § 1441(c). The State and Walker subsequently filed motions for summary judgment. The district court granted partial summary judgment to the State, the Regents, and Low, dismissing Walker's federal § 1983 claims with prejudice based on sovereign and qualified immunity. The district court also granted partial summary judgment to Walker, holding that the fees Walker retained prior to his filing bankruptcy on September 1, 1992, were discharged. The district court remanded to state court Walker's state-law claims against the State, the Regents, and Low, as well as the State's claims against Walker for fees earned after September 1, 1992.

Walker now appeals the district court's grant of summary judgment to the Regents and Low based on qualified immunity. The State appeals the district court's grant of summary judgment to Walker based on discharge in bankruptcy for Walker's fees earned pre-bankruptcy.

II. Propriety of Removal

As an initial matter, Walker argues that the district court lacked jurisdiction to hear this case because removal by the Regents and Low under 28 U.S.C. § 1441(c) was improper. We review a district court's determination of the propriety of removal de novo. *See Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689, 692 (5th Cir. 1995). Section 1441(c) is difficult to interpret, but under this court's precedent, it permitted removal of the case.

A. *Carl Heck Engineers*

Although there is a split among the circuits on the point, this court has held that a third-party indemnity defendant may remove a case to federal court pursuant to § 1441(c). *See Carl Heck Engineers v. Lafourche Parish Police Jury*, 622 F.2d 133 (5th Cir. 1980).[1] Neither the Regents nor Low is a third-party indemnity defendant because there is no basis for Walker to assert that they are liable for any part of his alleged debt to the state. *See* Fed.Rule Civ.P. 14; Tex.Rule Civ.P. 38. Rather, the Regents, joined in their individual capacities, and Low, newly joined both in his official and individual capacities, are counter-defendants

---

[1] For a discussion of the circuit split, *see* 14A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3724, at 388-393 (1985 & Supp. 1997). *See generally* Michael C. Massengale, Note, Riotous Uncertainty: A Quarrel with the "Commentators' Rule" Against Section 1441(c) Removal for Counterclaim, Cross-Claim, and Third-Party Defendants, 75 TEX.L.REV. 659 (1997) (citing relevant cases with analysis).

in Walker's counterclaim. This court has not previously extended the *Carl Heck* rationale to ordinary counter-defendants. Doing so would fly in the face of the well-pleaded complaint rule where the counter-defendants were the same parties as the state court plaintiffs.[2]

Here, however, the consequence of permitting removal satisfied Carl Heck without breaching the well-pleaded complaint rule. We shall assume that the Regents cannot remove under § 1441(c) when joined in their individual capacities as counter-defendants, because (in their official capacities) they were the plaintiffs by and through whom the state sued Walker. Low, on the other hand, was not a party in the case in any way before Walker sued him for § 1983 violations. If the rationale of Carl Heck correctly affords third-party defendants the opportunity of § 1441(c) removal to federal court, to which they could have removed when sued alone, then that rationale protects Low.

B. Separate & Independent

Section 1441(c) authorizes removal to federal court of cases in which a "separate and independent" federal claim or cause of action is joined with a nonremovable

---

[2] The well-pleaded complaint rule bases removal jurisdiction on the existence of a claim lying within federal jurisdiction on the face of a plaintiff's well-pleaded complaint. There has never been a suggestion that a defendant could, by asserting an artful counterclaim, render a case removable in violation of the well-pleaded complaint rule. *See, e.g., Rivet v. Regions Bank,* 139 L. Ed. 2d 912, 118 S. Ct. 921 (1998).

claim or cause of action.[3] A federal claim is separate and independent if it involves an obligation distinct from the nonremovable claims in the case. *See American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14, 71 S. Ct. 534, 540, 95 L. Ed. 702 (1951) ("Where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)."); *see also* 14A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3724, at 364-66 (1985 & Supp. 1997).

Walker contends that his claims against the Regents and Low were not "separate and independent" from his counterclaims against the State and, therefore, the district court lacked subject matter jurisdiction to hear this case. He is mistaken. Finn states that there is no "separate and independent" claim when the plaintiff suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the

---

[3] Section 1441(c) states in full:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

28 U.S.C. § 1441(c).

acts constituting such invasion were one or many, simple or complex.

Finn, at 13, 71 S. Ct. at 539-40 (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 47 S. Ct. 600, 602, 71 L. Ed. 1069 (1927)). Thus, a case involving the violation of a single primary right or wherein a party seeks redress for one legal wrong cannot contain separate and independent claims, despite multiple theories of liability against multiple defendants. *See Finn*, at 13-15, 71 S. Ct. at 540; *Able v. Upjohn Co.*, 829 F.2d 1330, 1332 (4th Cir. 1987).[4] When applied to a third-party defendant, this rule requires that the plaintiff's claims against the original defendant be "separate and independent" from the defendant's federal claims against the removing third-party defendant. *See Carl Heck Eng'rs*, 622 F.2d at 136; *see also In re Wilson Indus., Inc.*, 886 F.2d 93, 96 (5th Cir. 1989); 14A WRIGHT ET AL., supra, § 3724, at 392-94.

In asserting that his claims against the State are not separate and independent from his claims against the Regents and Low, Walker is barking up the wrong tree. The proper comparison is between the State's claims against Walker and Walker's federal claims against the Regents and Low. The State seeks redress for Walker's alleged failure to remit his professional fees to the University. In contrast, Walker seeks redress from the

---

[4] In addition, Finn has been read to question whether claims can be separate and independent when they involve substantially the same facts and transactions. *See Eastus v. Blue Bell Creameries, L.P.*, 97 F.3d 100, 104 (5th Cir. 1996); *Able*, 829 F.2d at 1332-33; *Addison v. Gulf Coast Contracting Servs., Inc.*, 744 F.2d 494, 500 (5th Cir. 1984).

Regents and Low for allegedly improperly terminating him. The State's claims against Walker and Walker's claims against the Regents and Low thus involve two distinct wrongs. Whether Walker was improperly terminated is a distinct wrong not dependent on whether Walker improperly retained professional fees in violation of the MSRDP.

Second, proof of Walker's § 1983 claims against the Regents and Low would not involve substantially the same facts as proof of the State's claims against Walker. If a substantive due process claim is cognizable at all, Walker must show that he had and was arbitrarily deprived of a property right in his employment. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 106 S. Ct. 507, 511-12, 88 L. Ed. 2d 523 (1985) (assuming without deciding that a substantive due process claim exists for an adverse decision of an academic institution). Regarding his equal protection claim, Walker must show that he was treated differently during his termination proceedings than were other similarly situated doctors and that there was no rational basis for this difference in treatment. *See United States v. Abou-Kassem*, 78 F.3d 161, 165 (5th Cir. 1996). In contrast, for the State to succeed on its state-law claims against Walker, it must initially show that Walker breached his MSRDP contract, and its claims would not require proof of substantially the same facts as will be relevant to Walker's § 1983 claims against the Regents and Low.

As a consequence, the State's claims against Walker are separate and independent from Walker's federal

claims against the Regents and Low, and removal under § 1441(c) was procedurally proper.[5]

III. Qualified Immunity

The district court granted partial judgment as a matter of law on the ground of qualified immunity to the Regents and Low, in their individual capacities, with respect to Walker's § 1983 claims. A grant of judgment as a matter of law is reviewed de novo, examining the evidence in the light most favorable to the nonmovant. *See Channer v. Hall*, 112 F.3d 214, 216 (5th Cir. 1997). The moving party will prevail if he has demonstrated that there is no genuine issue of material fact, and that he is entitled to judgment as a matter of law. *See id.*

Qualified immunity shields a public official exercising discretionary functions from liability for civil damages unless the public official's conduct violated clearly established constitutional or statutory rights of which an objectively reasonable person should have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982); *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 532-33 (5th Cir. 1997). This court reviews a claim of qualified immunity under a two-part analysis.

---

[5] Walker incorrectly cites *McKay v. Boyd Constr. Co.*, 769 F.2d 1084 (5th Cir. 1985), in support of his contention that removal was improper. McKay involved removal under § 1441(a), not § 1441(c). The McKay court expressly distinguished its holding under § 1441(a) from its understanding of how the case would have come out had removal been proper under § 1441(c). *See id.* at 1087-88. McKay is inapplicable to our removal analysis in this case.

First, it must be determined whether the plaintiff alleged the violation of a clearly established constitutional right. *See Coleman*, 113 F.3d at 533. Second, if so, we determine whether the defendant's conduct was objectively reasonable. *See id.*

The "touchstone" of the qualified immunity analysis is the "objective legal reasonableness" of the public official's conduct. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 3038-39, 97 L. Ed. 2d 523 (1987). That is, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 107 S. Ct. at 3039; *see also Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986) (stating that qualified immunity is designed to shield from civil liability "all but the plainly incompetent or those who knowingly violate the law").

A. Substantive Due Process

This court has said, "To succeed with a claim based on substantive due process in the public employment context, the plaintiff must show two things: (1) that he had a property interest/right in his employment, and (2) that the public employer's termination of that interest was arbitrary or capricious." *Moulton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993). *Moulton* exaggerated the status of a substantive due process claim for academic protection, however, because the Supreme Court has not squarely decided the issue. *See Ewing*, at 220-23, 106 S. Ct. at 511-12. *Moulton* held that no constitutionally protectable property interest existed, so it did not reach the question of arbitrary deprivation. In this case, as in

Ewing, even if Walker's tenure is a property right, he has failed to show that the Regents' or Low's actions in terminating him were arbitrary or capricious.

Walker essentially argues that when the Regents terminated him at the instigation of Low, rejecting a faculty tribunal's contrary recommendation, the Regents denied him a proper hearing, acted partially, and failed to fully consider his arguments and defenses regarding his retention of professional fees. Both the Supreme Court and this court have held in related contexts that substantive due process requires only that public officials exercise professional judgment, in a nonarbitrary and noncapricious manner, when depriving an individual of a protected property interest. *See Ewing*, 106 S. Ct. at 513; *Spuler v. Pickar*, 958 F.2d 103, 107 (5th Cir. 1992).

Walker did not remit to the University the substantial outside professional fees he earned while a UTHSC professor. The University alleged that his actions violated the MSRDP, and Walker contended that they did not or, even if they did, his debt was discharged in bankruptcy. Walker was afforded a hearing before the Regents regarding this dispute. They considered his side of the story and rejected it. Having reviewed the record, we cannot conclude that the Regents' determinations – that Walker retained professional fees that belonged to the University and moreover, that he refused to cooperate in resolving the matter – so lacked a basis in fact that their decision to terminate him was arbitrary, capricious, or taken without

professional judgment.[6] At best, one might argue that reasonable minds could disagree on the propriety of Walker's termination, and that is insufficient to defeat a public official's qualified immunity. *See Malley*, 106 S. Ct. at 1096. Consequently, the Regents' and Low's actions in terminating Walker either were not unconstitutional or were not objectively unreasonable in light of the law as it existed at the time of Walker's firing. The district court properly granted qualified immunity.

B. Equal Protection

"The Equal Protection Clause 'is essentially a direction that all persons similarly situated should be treated alike.' " *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988) (quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985)). As the district court correctly concluded, Walker is not a member of a suspect class. Therefore, under equal protection analysis, rational basis scrutiny applies. *See Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997).

Walker argues that the Regents and Low treated him differently from other similarly situated UTHSC faculty members who failed to remit their professional fees to the

---

[6] Walker also argues that the Regents and Low acted arbitrarily by (1) ignoring the fact that his debt had been discharged and (2) violating 11 U.S.C. § 525(a) which prohibits a governmental unit from terminating an employee because the employee has not paid a dischargeable debt. Inasmuch as the dischargeability of this debt is not yet settled, *see infra* Part IV(B), appellees were entitled to qualified immunity against these claims.

University. He is incorrect. Walker's case is factually distinct because he defied the University and refused to cooperate in resolving the dispute over the MSRDP. The other "similarly situated" faculty members to whom Walker refers all cooperated with the University, and most eventually reached settlement agreements regarding their improperly retained professional fees. Because any difference in treatment between Walker and other faculty members was based on distinctions in their factual situations, the Regents and Low had a rational basis for their treatment of Walker. The counter-defendants are entitled to qualified immunity from Walker's equal protection claim.

IV. Discharge in Bankruptcy

The State contends that the district court erred in holding that Walker's debt to the University for professional fees earned prior to September 1, 1992, was discharged. The State makes two arguments: (1) the Eleventh Amendment barred the bankruptcy court from discharging Walker's debt to the State; and (2) Walker's debt was nondischargeable under 11 U.S.C. § 523(a)(6) because it was a "willful and malicious injury" against the State. We hold, first, that the Eleventh Amendment did not preclude the discharge of Walker's debt to the State, and second, that there exists a fact issue regarding whether Walker's debt was nondischargeable under § 523(a)(6).[7]

---

[7] The State raised the Eleventh Amendment defense for the first time on appeal to this court, asserting that "it is . . . not clear that the bankruptcy court had jurisdiction to discharge an obligation to [UTHSC]." Specifically, the State (1) mentions a

A. The Eleventh Amendment and Bankruptcy Discharge

Walker's bankruptcy filing did not list the State as a creditor, and the State did not file a bankruptcy proof of claim. In fact, the State did not participate in any manner in Walker's bankruptcy case. Subsequently, in this entirely separate proceeding, the State sued Walker for conversion and breach of contract. Walker asserted the affirmative defense that his debt to the State was discharged in bankruptcy. The district court agreed with Walker, insofar as his debt to the State consists of professional fees earned prior to Walker's bankruptcy.

Consequently, the precise issue here is whether the Eleventh Amendment prevents the discharge of a debt owed to a state in a bankruptcy proceeding in which the state does not participate in any fashion.[8] In deciding that

---

potential Eleventh Amendment problem without substantive discussion in a footnote of its reply brief, (2) filed a Fifth Circuit Rule 28(j) letter prior to oral argument bringing to this court's attention a somewhat relevant case, and (3) discussed the Eleventh Amendment at oral argument. While the State has been less than helpful in supplying any case law or arguments to support its contention that the Eleventh Amendment barred the discharge of Walker's debt, it nonetheless has not waived the issue. Because of the strong federalism concerns behind the Eleventh Amendment, we may properly consider the issue even at this stage of the proceeding. *See Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 1362-63, 39 L. Ed. 2d 662 (1974); *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 555 (5th Cir. 1988).

[8] Prior to *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996), some courts held that debts owed to a state were dischargeable in bankruptcy even if the state had not filed a proof of claim. *See In re Glidden*, 653 F.2d 85, 89 (2d

it does not, we mean only that the discharge may be raised as a defense to the state's suit on the debt.[9]

The Eleventh Amendment jurisdictionally bars a suit in federal court by a private individual against an unconsenting state – absent waiver or congressional abrogation of sovereign immunity pursuant to section five of the Fourteenth Amendment – regardless of the relief sought by the plaintiff. *See* U.S. Const. amend. XI; *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 1124, 134 L. Ed. 2d 252 (1996). This court has recently held that even in an area of the law under the exclusive control of the federal

---

Cir. 1981); *Connecticut v. Crisp*, 521 F.2d 172, 178 (2d Cir. 1975); *Iowa State Dep't of Soc. Servs. v. Morris*, 10 B.R. 448, 455-56 (Bankr. N.D. Iowa 1981). The rationale behind these cases is that the Eleventh Amendment only protects a state from federal court money judgments paid out of the state treasury. *See Crisp*, 521 F.2d at 178; *Morris*, 10 B.R. at 456. Because a judgment of discharge in a bankruptcy case does not require payment out of a state's coffers, discharge does not implicate the Eleventh Amendment. *See Crisp*, 521 F.2d at 178; *Morris*, 10 B.R. at 456. The reasoning of these cases is incorrect, as expressed clearly and emphatically in *Seminole*: "The Eleventh Amendment does not exist solely in order to prevent federal court judgments that must be paid out of a State's treasury, it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Seminole*, 116 S. Ct. at 1124 (internal citations and quotations omitted).

[9] The State does not assert that the Eleventh Amendment barred the federal district court from adjudicating Walker's defense of discharge in this case. Once the case was removed, the court had jurisdiction over the State's claims against Walker, and his assertion of the discharge defense was not equivalent to seeking affirmative relief, such as an injunction against further collection efforts under 11 U.S.C. § 524. We have no occasion to consider the road not taken by Walker.

government, such as bankruptcy, the Eleventh Amendment absolutely bars such suits. *See In re Estate of Fernandez*, 123 F.3d 241 (5th Cir. 1997) (holding attempted statutory waiver of sovereign immunity under 11 U.S.C. § 106(a) unconstitutional).[10]

Cases that have considered *Seminole*'s impact on bankruptcy practice have generally concerned adversary proceedings brought by the trustee or a party in interest against the state in federal court to recover money damages.[11] Just as

---

[10] It is also well settled that suits against certain state agents or instrumentalities fall within the Eleventh Amendment's compass. *See Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 117 S. Ct. 900, 903-04, 137 L. Ed. 2d 55 (1997). The parties in this case do not dispute that UTHSC and the Regents of the University of Texas, sued in their official capacities, may invoke the State's Eleventh Amendment immunity; they are "arms" of the state for purposes of the Eleventh Amendment. *See id.; United Carolina Bank v. Board of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553, 556-61 (5th Cir. Unit A 1982).

[11] Three recent lower court cases are representative. In *Kish v. Verniero*, 212 B.R. 808 (D.N.J. 1997) (Brown, J.), and *Rose v. United States Dept. of Educ.*, 214 B.R. 372 (Bankr. W.D. Mo. 1997) (Koger, J.), the debtors filed actions directly against the state to determine the dischargeability of certain debts owed to the state. In both cases, the state had not filed a proof of claim in the debtors' bankruptcy proceedings. Both courts held that they lacked jurisdiction pursuant to the Eleventh Amendment to hear the debtors' claims against the state.

In *In re Martinez*, 196 B.R. 225 (D.P.R. 1996), the debtors filed for bankruptcy under Chapter 13 in 1985. The debtors listed a tax debt to the Treasury of the Commonwealth of Puerto Rico ("Treasury") on their schedule of creditors, but the Treasury did not file a proof of claim. The district court found that the Treasury was aware of the debtors' bankruptcy petition. A reorganization plan was confirmed by the bankruptcy court in

Seminole renders 11 U.S.C. § 106(a) unconstitutional, it perforce deprives federal courts of jurisdiction over these unconsented-to suits against the state. The extent to which filing a proof of claim constitutes waiver of this immunity is uncertain. The Fourth Circuit has held that even where the state filed a proof of claim for one type of past due taxes, it did not waive Eleventh Amendment immunity against an adversary proceeding in bankruptcy court to determine a different type of tax. *See In re Creative Goldsmiths, Inc.*, 119 F.3d 1140, 1149 (4th Cir. 1997). Since UTHSC never filed a proof of claim, however, waiver is irrelevant to the present analysis. The pressing issue here is whether a bankruptcy case, in and of itself, constitutes an unconsented suit against a creditor state, so that the debtor's discharge, which "operates as an injunction" against collection of the debt, 11 U.S.C. § 524(a)(2), is ineffectual against the state under the Eleventh Amendment.

1986. In 1989, the Treasury (an arm of the state for purposes of the Eleventh Amendment) filed a tax lien on the debtors' property. The debtors alleged that the Treasury had violated the automatic stay and, therefore, should be liable for actual and punitive damages. *See id.* at 226-27. The district court held that "it is clear that Treasury violated the debtors' automatic stay when Treasury filed a tax lien over debtors' property after the Chapter 13 petition had been filed." *Id.* at 228. Nonetheless, it also held that it did not have jurisdiction over the debtors' claim against Treasury for willful violation of the automatic stay because of Treasury's sovereign immunity, which had not been waived. *See id.* at 230. Treasury's lien remained in place despite the fact that Treasury both had actual knowledge of debtors' bankruptcy proceeding and refused to participate in that proceeding.

The argument for an Eleventh Amendment bar would assert that although the State was not a named defendant in Walker's bankruptcy case, it was an indirect party because its legal rights were adjudicated and altered (albeit without its knowledge) when the bankruptcy court discharged *Walker*'s debt. *Cf. Regents of Univ. of Cal.*, 117 S. Ct. at 904-05 (holding that the "underlying Eleventh Amendment question" is the state's "potential legal liability," not whether any award of damages would actually come from the state's coffers); *Kish v. Verniero*, 212 B.R. 808, 814 n. 5 (D.N.J. 1997) (citing *Regents of University of California v. Doe* and stating that "the relevant inquiry for Eleventh Amendment purposes is whether a state's potential legal rights are affected"). If Walker's discharge was valid, then the State was enjoined in perpetuity from collecting that debt. *See* 11 U.S.C. § 524(a)(2). This can be viewed as both subjecting the state to the indignity of the coercive powers of a federal court, *see Seminole*, 116 S. Ct. at 1124, and significantly altering the legal rights of the state, *see Regents of Univ. of Cal.*, 117 S. Ct. at 904.

Put another way, discharging a debt owed to the state either restrains the state from acting by enjoining it from collecting the debt, or compels the state to act by forcing it to file a proof of claim in bankruptcy court in order to collect the debt.[12] The state is thus presented with a

---

[12] The Supreme Court has held that "the general rule is that a suit is against the sovereign if 'the judgment would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' " *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct.

Hobson's choice: either subject yourself to federal court jurisdiction or take nothing.[13] If the state acts, it is potentially forced to waive its sovereign immunity by filing a proof of claim in the bankruptcy court.[14] If the state does nothing, it is permanently barred from collecting its debt and from recovering a pro rata share of the debtor's estate. It can be argued that the Eleventh Amendment should prevent a state from being forced to make such a choice.[15]

900, 908 n. 11, 79 L. Ed. 2d 67 (1984) (quoting *Dugan v. Rank*, 372 U.S. 609, 83 S. Ct. 999, 1006, 10 L. Ed. 2d 15 (1963)).

[13] But *see DeKalb County Div. of Family and Children Servs. v. Platter*, 140 F.3d 676, 1998 U.S. App. LEXIS 5998, 1998 WL 138847, at *3 (7th Cir. 1998) (arguing that "the imposition of this decision by Congress on the states 'does not amount to the exercise of federal judicial power to hale a state into federal court against its will and in violation of the Eleventh Amendment.' " (quoting *Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 787 (4th Cir. 1997))).

[14] After *Seminole*, some courts have held that a state waives its Eleventh Amendment immunity to some extent when it files a proof of claim in a bankruptcy proceeding. *See, e.g., In re Creative Goldsmiths*, 119 F.3d 1140, 1148-49 (4th Cir. 1997); *Rose v. United States Dept. of Educ.*, 215 B.R. 755, 761-62 (Bankr. W.D. Mo. 1997); *In re NVR L.P.*, 206 B.R. 831, 850-51 (Bankr. E.D. Va. 1997) (collecting cases and extensively discussing waiver).

[15] But *see New Jersey v. Mocco*, 206 B.R. 691 (D.N.J. 1997) (holding that a potential state-court fraud judgment owed to a state that had notice of a pending bankruptcy proceeding and failed to file a proof of claim could be discharged without violating the Eleventh Amendment); *In re Kings Terrace Nursing Home & Health Related Facility*, 184 B.R. 200 (S.D.N.Y. 1995) (holding that a state may not recoup pre-petition Medicaid overpayments to the debtor because the state knowingly and intentionally failed to file a proof of claim and, therefore, the debt was discharged when the debtor's bankruptcy plan was confirmed).

Resting as it does on extrapolations from Supreme Court cases, this argument is not specious, but it is ultimately unpersuasive on the facts before us. Its key assumption is the equation of a bankruptcy case with a suit against the state, but this assumption is flawed. In a bankruptcy case, in its simplest terms, a debtor turns over his assets, which constitute the estate, for liquidation by a trustee for the benefit of creditors according to their statutory priorities. Bankruptcy law modifies the state's collection rights with respect to its claims against the debtor, but it also affords the state an opportunity to share in the collective recovery. Bankruptcy operates by virtue of the Supremacy Clause and without forcing the state to submit to suit in federal court. *See Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 787 (4th Cir. 1997) ("While resolution of an adversary proceeding against a state depends on court jurisdiction over that state, the power of the bankruptcy court to enter an order confirming a plan . . . derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates.").

From this standpoint, Walker's entitlement to assert his discharge against the state's claims invoked no Eleventh Amendment consequences. The state never was hauled into federal court against its will in the bankruptcy. In fact, because the state was never notified of the bankruptcy and never had the opportunity to file a timely claim, bankruptcy law should ordinarily expressly protect the state's claim from being discharged. *See* 11 U.S.C. § 523(a)(3)(B).[16] That is just the provision on which the

---

[16] 11 U.S.C. § 523(a)(3)(B) states that a debtor is not discharged from certain claims, including those for willful and

state predicates its request for relief against the discharge defense here.

Additional support for our view that the granting of a bankruptcy discharge does not offend the Eleventh Amendment – although commencement of certain adversary proceedings directly against a state that has not filed a proof of claim in a bankruptcy case would do so – derives from hoary Supreme Court authority. The Court has long held that a federal bankruptcy court decision can affect the lien interests of the states. *See Gardner v. New Jersey*, 329 U.S. 565, 67 S. Ct. 467, 91 L.Ed. 504 (1947). In *Gardner*, the Court overruled an apparent Eleventh

---

malicious injury, if the creditor was not listed or scheduled by the debtor in time to permit timely filing of a proof of claim and timely request of a determination of dischargeability. Walker, mysteriously, filed a "no-asset" case, in which creditors are informed that they need not file proofs of claim because such filings would be futile. But his failure to notify the University also deprived it of the opportunity timely to pursue a nondischargeability action.

Another peculiarity about this case might have posed an Eleventh Amendment problem but has not been raised. The Bankruptcy Code provides that federal courts have exclusive jurisdiction of four types of nondischargeability claims, including the willful and malicious injury exception, § 525(a)(6), on which the state relies. *See* 11 U.S.C. § 523(c). This provision ordinarily requires a creditor to proceed only in federal court to obtain a nondischargeability ruling on any of those four grounds, whether or not the creditor received timely notice of the bankruptcy case. *See* 11 U.S.C. § 523(a)(3)(B). The state did not initially pursue this course, however, and does not challenge the current procedural posture of the case. Equally important, Walker has not challenged the state's right to litigate nondischargeability under § 523(a)(6) under the circumstances before us.

Amendment objection to the process of adjudicating the validity and priority of competing liens where the state had filed a proof of claim:

It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is none the less such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash. When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim.

The extent of the constitutional authority of the bankruptcy court in this respect was passed upon in *People of State of New York v. Irving Trust Co.*, 288 U.S. 329, 53 S. Ct. 389, 77 L.Ed. 815. In that case the Court sustained an order of the bankruptcy court which barred a State's tax claim because not filed within the time fixed for the filing of claims. The Court stated, "If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated."

In the present circumstances there is, therefore, no collision between § 77 and the Constitution.

Gardner, 329 U.S., 67 S. Ct. at 472 (internal citations omitted). Until these cases are overruled, *Seminole* does not and should not impair their force.

This is a roundabout way to concluding that unless Walker's debt was nondischargeable under § 523(a)(6), his discharge could be raised against the state's lawsuit to collect a prepetition debt.

B. The Willful and Malicious Injury Exception to Discharge

The final issue is the applicability of § 523(a)(6) to Walker's acts in breaching his contract and failing to account to UTHSC for his outside earnings.

Section 523(a)(6) bars the discharge of a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). A "willful and malicious injury" results from an act done with the actual intent to cause injury, not from an act done intentionally that causes injury. *See Kawaauhau v. Geiger*, 140 L. Ed. 2d 90, 118 S. Ct. 974, 977-78 (1998). In other words, "for willfulness and malice to prevent discharge under § 523(a)(6), the debtor must have intended the actual injury that resulted." *In re Delaney*, 97 F.3d 800, 802 (5th Cir. 1996). "Debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Kawaauhau*, 118 S. Ct. at 978. "Intent to injure may be established by a showing that the debtor intentionally took action that necessarily

caused, or was substantially certain to cause, the injury." *In re Delaney*, 97 F.3d at 802.

Neither a claim for breach of contract nor the tort of conversion necessarily involves an intentional injury. *See Kawaauhau*, 118 S. Ct. at 977 (negligence and breach of contract); *National Union Fire Ins. Co. v. Care Flight Air Ambulance Serv., Inc.*, 18 F.3d 323, 325 (5th Cir. 1994) (conversion); *Moody v. Smith*, 899 F.2d 383, 385 (5th Cir. 1990) (conversion). The act of conversion, however, can result in a "willful and malicious injury." *See McIntyre v. Kavanaugh*, 242 U.S. 138, 37 S. Ct. 38, 61 L.Ed. 205 (1916); *see also Kawaauhau*, 118 S. Ct. at 978 (reaffirming the holding of McIntyre). In addition, under Texas law, a claim for breach of contract and the tort of conversion may arise from the same set of facts. *See Care Flight Air Ambulance Serv.*, 18 F.3d at 326.

Walker admits that he acted intentionally when he kept the professional fees he earned while a UTHSC faculty member. Consequently, the issue before this court is whether it is appropriate to grant Walker judgment as a matter of law that his pre-bankruptcy debt to the University is discharged and to conclude that § 523(a)(6) is inapplicable because the injury suffered by the State allegedly was not intended by Walker (i.e., was not "willful and malicious").

The district court found that Walker's retention of his professional fees was an "innocent and technical" act rather than a "willful and malicious injury." *See Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 55 S. Ct. 151, 153, 79 L. Ed. 393 (1934) (Cardozo, J.) ("[A] willful and malicious injury does not follow as of course from every act of

conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without willfulness or malice."); *see also Kawaauhau*, 118 S. Ct. at 978 (reaffirming the holding of *Davis*). For the following reasons, we reverse the district court's grant of judgment as a matter of law to Walker on the issue of § 523(a)(6) nondischargeability. An issue of fact exists regarding whether Walker was aware of his obligations to the University under the MSRDP and nonetheless knowingly kept his professional fees with the intent of depriving the University of money owed to it.

Walker signed his MSRDP contract in 1980. The MSRDP contract expressly states that all fees received by a faculty member for "professional services" are to be assigned to the University. The MSRDP's by-laws expressly state that "professional fees" include fees for all "court appearances, depositions, or legal consultations." The MSRDP contract and by-law language is crystal clear, and all MSRDP participants were sent a memorandum in November 1990 reminding them that "fees for all court appearances, depositions and legal consultations (including expert witness fees) shall be deposited in the departmental MSRDP account." Walker claims that he did not receive this memorandum and that he did not read the MSRDP by-laws until 1993, months after his September 1992 bankruptcy filing. He also testified that the general belief among UTHSC faculty members was that professional fees earned for legal consulting need not be remitted to the University. The UTHSC faculty tribunal that reviewed Walker's case as part of UTHSC's grievance procedures found that there was a lack of understanding

among faculty members about the MSRDP's requirements. Based upon these conflicting facts alone, what Walker knew regarding his obligations under the MSRDP and when he knew it are disputed. If a factfinder were to decide that Walker knew of his obligations under the MSRDP contract and its by-laws, either at the time he signed the contract or received the November 1990 memorandum, then it might also find that Walker knowingly retained his professional fees in violation of the MSRDP, an act which he knew would necessarily cause the University's injury. This, in turn, could result in a finding of "willful and malicious injury." Such factual issues must be submitted to a trier of fact in order to determine if Walker's debt was nondischargeable under § 523(a)(6).

V. Conclusion

For the foregoing reasons, we affirm the district court's judgment upholding the Regents' and Low's qualified immunity, and we reverse the district court's judgment regarding Walker's discharge in bankruptcy.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

(2)

FILED
NOV 19 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-350

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

WILLIAM E. WALKER, M.D.,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO WALKER'S PETITION FOR WRIT OF CERTIORARI

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DAVID A. TALBOT, JR.
Deputy Attorney General for Litigation

TONI HUNTER
Chief, General Litigation Division

ANTOINETTE HUNTER
RONALD R. DEL VENTO
CHRISTOPHER JOHNSEN
MARK BROWNING
Assistant Attorneys General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120

Counsel for Respondent

34 pp

QUESTIONS PRESENTED FOR REVIEW

Was removal by counter-defendant proper under 28 U.S.C. § 1441(c)?

Did the Court of Appeals view the summary judgment evidence in the light most favorable to the non-movant?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENTS FOR DENYING THE PETITION 7

I. Removal by Counter-Defendant Low Was Proper Under 28 U.S.C. § 1441(c). 7

Was Removal Proper? 9

II. The Court of Appeals Viewed the Disputed Evidence in the Light Most Favorable to the Non-Movant When it Affirmed the District Court's Grant of Qualified Immunity 16

Walker's Substantive Due Process Claims 17

Walker's Equal Protection Claims 20

CONCLUSION 21

APPENDIX

TABLE OF AUTHORITIES

CASES

Aldens, Inc. v. Packel, 524 F.2d 38, (3rd Cir. 1975) 8

American Fire & Casualty Co. v. Finn, 341 U.S. 6, 18, 71 S.Ct. 534 (1951) 6, 10, 11

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986) 16

Bender v. Williamsport Area School Dist., 475 U.S. 534, 106 S.Ct. 1326 (1986) 8

Berger v. Reynolds Metals Co., 39 F.R.D. 313 (E.D.Penn. 1966) 8

Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury, 622 F.2d 133 (5th Cir. 1980) 11-14

Caterpillar, Inc. v. Lewis, 519 U.S. 61, 117 S.Ct. 467 (1996) 6

Channell v. Citicorp. National Services, Inc., 89 F.3d 379 (7th Cir. 1996) 12

*Crawford-El v. Britton*_U.S. _, 118 S.Ct. 1584 (1998) 17

Federal Deposit Insurance Corp. v. La Rambla Shopping Center, Inc., 791 F.2d 215 (1st Cir. 1986) 8

First Federal Savings and Loan Assoc. of Boston v. Greenwald, 591 F.2d 417 (1st Cir. 1979) 15

Ford Motor Credit Co. v. Aaron-Lincoln Mercury, Inc., 563 F.Supp. 1108 (N.D. Ill. 1983) 14

Franchise Tax Bd. of the State of California v. Constr. Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 103 S.Ct. 2841 (1983) 9, 13, 15

Gentry v. Smith, 487 F.2d 571, 579 (5th Cir. 1973) 12

Green v. McKaskle, 788 F.2d 1116 (5th Cir. 1986) 20

Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702, 92 S.Ct. 1344 (1972) 6

Gully v. First Nat. Bank in Meridian, 299 U.S. 109, 57 S.Ct. 96 (1936) 9, 15

Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358 (1991) 8

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982) 16

Heller v. Doe, 509 U.S. 312, 113 S.Ct. 2637 (1993) 11

Hercules Incorp. v. Dynamic Export Corp., 71 F.R.D. 101 (S.D. N.Y. 1976) 12

Iglesias v. Mutual Life Insurance Company of New York, 156 F.3d 237 (1st Cir. 1998) 12

Johnson v. Rodriguez, 110 F.3d 299 (5th Cir. 1997) 20

Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099 (1985) .. 8

Kersey v. Shipley, 673 F.2d 730 (4th Cir. 1982), *cert. denied*, 459 U.S. 836, 103 S.Ct. 80 (1982) 18

Lesnick v. Public Indus. Corp., 144 F.2d 968 (C.C.A.2 N.Y. 1944 .....)12

Levitt v. University of Texas at El Paso, 759 F.2d 1224 (5th Cir. 1985) 18

Lewis v. Windsor Door, 926 F.2d 729 (8th Cir. 1991) ... 13, 14

Malley v. Briggs, 475 U.S. 335, 106 S. Ct. 1092 (1986) . 17, 19

Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986) 16

Mongo Band of Mission Indians v. Calif. State Bd. of Equalization, 858 F.2d 1376 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006, 109 S.Ct. 787 (1989) 8

Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 109 S.Ct. 2218 (1989) 4

Pioche Mines Consol., Inc. v. Fidelity-Philadelphia Trust Co., 206 F.2d 336 (9th Cir. 1953), *cert. denied*, 346 U.S. 899, 74 S.Ct. 225 (1953) 8

Radio Shack Franchise Dept., A Division of Tandy Corp. v. Williams, 804 F.Supp. 151 (D. Kan. 1992) 14

Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 106 S.Ct. 507 (1985) 17

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S.Ct. 868 (1941) 10

Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789 (1991) 16

State of Texas v. Walker, 142 F.3, 813
(5th Cir. 1998) 12-14,19, 20

Thomas v. Shelton, 740 F.2d 478 (7th Cir. 1984) 13, 14

United Artists Corp. v. Masterpiece Productions, Inc.,
221 F.2d 213 (2nd Cir. 1955) 12

Weiss v. Anker, 421 F.Supp. 1040 (E.D.N.Y. 1976) 18

West v. Aurora City, 6 Wall. 139, 18 L.Ed. 819 (1867) 10

Will v. Michigan Dept. of State Police,
491 U.S. 58, 109 S.Ct. 2304 (1989) 8

Wong v. Bacon, 445 F.Supp. 1177 (N.D. Cal. 1977) 15

Woods v. Johnson, 75 F.3d 1017 (5th Cir. 1996),
cert. denied, _ U.S. _, 117 S.Ct. 150 (1996) 20

Rules

FED.R.CIV.P. 8 12

FED.R.CIV.P. 12 12

FED.R.CIV.P. 13(h) 7, 12

FED.R.CIV.P. 56 ..... 12, 18

Tex.R.Civ.P. 97(b) 7

Tex.R.Civ.P. 97(f) 7

Statutes

28 U.S.C. § 71 9

11 U.S.C. § 523 ..... 5, 19

11 U.S.C. § 523(a)(6) ..... 1911 U.S.C. § 523(a)(6)19

28 U.S.C. § 1001 15

28 U.S.C. §1331 9

28 U.S.C. § 1335 8

28 U.S.C. § 1367 12

28 U.S.C. § 1441(a) 4, 10

28 U.S.C. § 1441(c) 2, 4, 6, 7, 9-11, 15

28 U.S.C. § 1653 4

28 U.S.C. § 2202 15

28 U.S.C. § 1447(c) 6

Other Authorities

Wright, Miller, Kane, 6 Federal Practice and Procedure § 1404 (West 1990) 8, 12

No. 98-350

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

WILLIAM E. WALKER, M.D.,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO WALKER'S PETITION FOR WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 523
28 U.S.C. § 1331
28 U.S.C. § 1441(a)
28 U.S.C. § 1441(c)

STATEMENT OF THE CASE

Petitioner Dr. William Walker asks this Court to vacate a judgment, affirmed by the Court of Appeals for the Fifth Circuit, dismissing his counterclaims against the individual members of the Board of Regents of the University of Texas System, and the President of the University of Texas Health Science Center at Houston, M. David Low. He challenges the federal court's removal jurisdiction over this case, which was removed by the counter-defendants pursuant to 28 U.S.C. § 1441(c). In the alternative, he challenges the district court and the court of appeals in their evaluation of the summary judgment evidence before them. Because the court of appeals did not err in its opinion and judgment, Respondents respectfully request that this Court deny Walker's petition for writ of *certiorari*.

Dr. Walker was a tenured cardiologist at the University of Texas Health Science Center in Houston (UTHSC). As a condition of his employment, he signed a contract with UTHSC in which he joined the Medical Services, Research, and Development Plan (MSRDP). This plan required him to remit any outside professional fees he earned to UTHSC, which included appearance fees for court appearances, depositions, and other legal consultations. Walker earned significant fees while employed at UTHSC, but he failed to remit any to the university. When UTHSC learned of his and other faculty members' non-compliance with the MSRDP, it engaged in a survey of the faculty's outside earnings. Several faculty were found by UTHSC to be in non-compliance and UTHSC entered into negotiations with them to recover the funds. All faculty entered into sizeable settlements with the University except Walker. Walker did offer to remit approximately 5% of the fees UTHSC had estimated he owed, but he refused to provide the University with an accounting of his outside earnings. With no accounting verifying his earnings, the University rejected his offer and started termination proceedings. A UTHSC hearing tribunal found that Walker had

violated the terms of the MSRDP, but that several faculty had done so, and that there was some confusion about its terms, and thus termination was improper. UTHSC rejected this recommendation and presented Walker's termination to a formal meeting of the University of Texas Board of Regents. After a hearing that included testimony from both the UTHSC and Walker, the regents voted to terminate his employment. See Memorandum and Order of the District Court, State of Texas' Petition for Writ of Certiorari, Appendix at A2-A3 and A27-31.

Prior to the University's informal actions to recover the MSRDP funds from Walker, he filed for bankruptcy relief under Chapter 7. It is undisputed that he never listed the University as a creditor, and the University never filed a proof of claim.

The State of Texas, by and through the University of Texas System Board of Regents in their official capacities and UTHSC, filed an original petition in Harris County, Texas district court on February 8, 1995. This petition sought an accounting of funds the University believed Walker converted to his own use, in breach of his employment contract. On August 10, 1995, Walker filed an "Original Counter Claim and Third-Party Claim" against the Board of Regents in both their official and individual capacities, and UTHSC President M. David Low in both his individual and official capacities.[1] Walker's claims related to his allegations that his constitutional right to due process was violated by the named

---

[1]Walker labeled President Low as the only third-party defendant in his Original Counter Claim and Third-Party Claim, and labeled the Board of Regents in their official and individual capacities as counter-defendants. The members of the Board of Regents in their individual capacities have no authority to be and were not parties to the original action for conversion and breach of contract. The Original Petition identified the plaintiff as: "Plaintiff is the State of Texas acting through its agency the Board of Regents of the University of Texas System, established pursuant to Tex. Educ. Code § 65.11, and charged with the management of the University of Texas Health Science Center at Houston." Original Petition at ¶ 2.

parties when they terminated him from his tenured faculty position. On September 25, 1995, the Counter-Defendants UTHSC and the Board of Regents, in their official capacities moved the state court to sever the original action from Walker's Counterclaims and third-party claims.[2] Those motions were never ruled on by the Harris County district court before the removal calendar elapsed. On September 29, 1995, this action was timely removed pursuant to 28 U.S.C. § 1441(a), later amended to § 1441(c).[3]

On April 30, 1996, UTHSC, the Board of Regents, and President Low filed a motion for partial summary judgment for those claims brought against them by Walker. Approximately a month later Walker moved for summary judgment on the conversion and breach of contract disputes, claiming any monies owed had been discharged in bankruptcy. The State of Texas, through UTHSC, filed a response to Walker's motion for summary judgment, arguing that the interests were non-dischargeable under 11 U.S.C. § 523. On December 24, 1996, the district granted in part, and denied in part, the pending motions for summary

---

[2]On the same day the third-party defendants (President Low in both capacities and the Board of Regents in their individual capacities) moved to strike Walker's third-party claims as barred by the state district court's scheduling order.

[3]The parties filed their Rule 26(f) Joint Report with the district court on March 18, 1996. In this Joint Report the UTHSC, the Board of Regents, and President Low all acknowledged that they had erred in their allegation of removal jurisdiction, and indicated that they had corrected this allegation by, pursuant to 28 U.S.C. § 1653, substituting 28 U.S.C. § 1441(c) for the original § 1441(a) basis of jurisdiction. See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830-32, 109 S.Ct. 2218, 2222 (1989). Their motion for leave to file an amended notice of removal, alleging 28 U.S.C. § 1441(c) as the basis for jurisdiction, was granted by the district court on March 29, 1996. In their Rule 26(f) Joint Report, Walker contested § 1441(c) jurisdiction, and indicated he would file a motion to remand. He did not.

part, and denied in part, the pending motions for summary judgment. The court dismissed several claims against UTHSC and the regents and President Low in their official capacities pursuant to the Eleventh Amendment, and granted summary judgment on all constitutional claims against the regents and President Low in their individual capacities based on qualified immunity. The court also granted Walker's motion for summary judgment on the conversion claim, finding those interests had been discharged in an earlier bankruptcy proceeding. Final judgment was entered on December 30, 1996.

On January 29, 1997, UTHSC and Walker filed appeals. The University appealed the district court's finding on the discharge in bankruptcy, while Walker appealed the dismissal of his due process and equal protection claims pursuant to qualified immunity. The Fifth Circuit affirmed the district court's judgment on the constitutional claims, finding that the summary judgment evidence before it amply demonstrated that the officials exercised professional judgment, and that it was objectively reasonable for them to have acted as they did. The Fifth Circuit reversed and remanded the discharge in bankruptcy issue, finding that there were disputed questions of material fact precluding summary judgment. In reaching that issue, the court of appeals found that the Eleventh Amendment did not bar the bankruptcy court from having discharged interests of the state.[4]

The central question raised by Walker in his Petition is whether the counter-defendants below could remove the federal

---

[4]The State of Texas has petitioned for writ of *certiorari* on this issue.

claims present in Walker's counter-claims petition.[5] The Fifth Circuit was correct in permitting removal by non-original-plaintiff counter-defendant President Low. Section 1441 (c) does not preclude such removals. Earlier versions of this provision which limited removal to the "defendant or defendants" were amended by Congress to delete that language. The counter-claims on which removal was based meet the statutory requirements. Although the court of appeals did not decide the issue, removal would have been proper by the non-original-plaintiff counter-defendant regents in their individual capacities as well. In fact, respondents can find no authority for the argument that an original-plaintiff counter-defendant is precluded from removing a claim pursuant to 28 U.S.C. § 1441(c) that is within the original jurisdiction of the federal court.

---

[5]Although Congress provided for the expedited, 30 day consideration of procedural defects in removal, 28 U.S.C. § 1447(c), subject matter jurisdiction can be raised at any time. *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, _, 117 S.Ct. 467, 474-74 (1996)(citing *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 18, 71 S.Ct. 534, 542 (1951). Walker never filed a motion to remand, instead waiting until the case was on appeal to object to the removal to federal court.

> Longstanding decisions of this Court make clear . . . that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.

Caterpillar, Inc. v. Lewis, 519 U.S. 61, _, 117 S.Ct. 467, 474-75 (1996)(quoting *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702, 92 S.Ct. 1344, 1347 (1972)). However, neither *Caterpillar* nor *Grubbs* addressed the situation before this Court: where original jurisdiction only arose in the defendant's counter-claims. Nonetheless, Walker cannot dispute that the district court would have had original jurisdiction had his claims been filed in federal court. Moreover, all the policy considerations this Court found "overwhelming" in *Caterpillar*, "considerations of finality, efficiency, and economy", are present in this action. 519 U.S. at _, 117 S.Ct. at 476. Walker has waived his complaints about removal.

Walker's argument is that only an original plaintiff can "join" claims, and that only an original defendant can remove an action. This argument does not withstand scrutiny. There is no basis to force such a constricted view of "joinder" on the language of the statute. Walker's counterclaims raise claims under the original jurisdiction of the federal court. Respondents can locate no basis in either Article III or § 1441(c) that precludes the federal district court from exercising jurisdiction over this case. Moreover, liberal joinder rules and public policy promoting the efficient litigation of multiple and related claims support a less artificial interpretation of the statute.

ARGUMENTS FOR DENYING THE PETITION

I. REMOVAL BY COUNTER-DEFENDANT LOW WAS PROPER UNDER 28 U.S.C. § 1441(C).

As a preliminary matter, the nature of the parties should be clarified. Walker labeled his petition as comprising counterclaims and third-party claims, and this label has remained in the pleadings of all parties, creating some confusion. None of Walker's claims seek indemnification or to transfer his liability for conversion to another party. Instead, Walker seeks remedies for his termination, both from the original plaintiffs as well as new parties. Although the issue has not been briefed, it seems unlikely that the claims against the university and the regents in their official capacities are compulsory counterclaims, and thus those claims were brought in as permissive counterclaims pursuant to Tex.R.Civ.P. 97(b). His claims against the regents in their individual capacities and President Low in both capacities, since they are new parties, must have been brought in pursuant to Tex.R.Civ.P. 97(f), the state counterpart to FED.R.CIV.P. 13(h).

The regents in their individual capacities were not parties to the original action in state court. In their official capacities, the regents embody the state office they hold. "[T]he real party in interest in an official-capacity suit is the governmental entity and not the named official . . . ." *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 361 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3105 (1985). The distinction is more than a "mere pleading device". *Hafer*, 502 U.S. at 27, 112 S.Ct. at 362 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2311 (1989)); see also *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 543 n.6, 106 S.Ct. 1326, 1332 n.6 (1986)(Actions of individual capacity defendants and official capacity defendants "are generally treated as the transactions of two different legal personages"); *Mongo Band of Mission Indians v. Calif. State Bd. of Equalization*, 858 F.2d 1376, 1382 n. 5 (9th Cir. 1988)(disregard the citizenship of individual board members in determining diversity jurisdiction under 28 U.S.C. § 1335), *cert. denied*, 488 U.S. 1006, 109 S.Ct. 787 (1989). Because the regents, when they acted as plaintiffs, could only be acting in their official capacities, they were not plaintiffs in their individual capacities and had not appeared as such in the original action. President Low was not a plaintiff in any capacity in the original state court action.

The authorities are divided as to whether Walker's claims can be "true" counterclaims. See *Pioche Mines Consol., Inc. v. Fidelity-Philadelphia Trust Co.*, 206 F.2d 336 (9th Cir. 1953), *cert. denied*, 346 U.S. 899, 74 S.Ct. 225 (1953); *Aldens, Inc. v. Packel*, 524 F.2d 38, 50-51 (3rd Cir. 1975); *Federal Deposit Insurance Corp. v. La Rambla Shopping Center, Inc.*, 791 F.2d 215, 220 (1st Cir. 1986); *Berger v. Reynolds Metals Co.*, 39 F.R.D. 313, 314-15 (E.D.Penn. 1966). See also Wright, Miller, Kane, 6 Federal Practice and Procedure § 1404 (West 1990). Nonetheless, except for the effort by the University, the regents and President Low to sever the original action against Walker from his counterclaim suit and to strike his pleading as untimely as per the state district court's scheduling order, no objection was made to the form of the

pleadings denoting some parties or claims as counter-claim or third-party in nature, and no objection as to process was made. The counter-claims meet jurisdictional requirements for permissive counterclaims. They "arise under" the Fourteenth Amendment. 28 U.S.C. § 1331; *Franchise Tax Bd. of the State of California v. Constr. Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 7-8, 103 S.Ct. 2841, 2845 (1983); *Gully v. First Nat. Bank in Meridian*, 299 U.S. 109, 97, 57 S.Ct. 96, 97 (1936).

Was Removal Proper?

Respondents removed this action pursuant to 28 U.S.C. § 1441(c). Section 1441(c) provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.[6]

Nothing in the language of § 1441(c) precludes a counter-defendant from removing the entire case. Although this Court has not addressed the ability of a counter-defendant to remove an action pursuant to the current § 1441(c), it has addressed the issue in a removal action by a counter-defendant based upon diversity jurisdiction pursuant to 28 U.S.C. § 71, a precursor to § 1441(c).

---

[6]Section 1441(c) read as follows prior to the Judicial Improvements Act of 1990 [Pub. L. No. 101-650, 104 Stat. 5089]:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S.Ct. 868 (1941). The *Shamrock Oil* Court noted that Congress, in drafting § 71, had amended the statute to add the language requiring removal by the "defendant or defendants" instead of by "either party". The Court further noted that it had already held under an earlier version of the statute that a "plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction" of the state court. *Id.* at 106, 61 S.Ct. at 871 (citing *West v. Aurora City*, 6 Wall. 139, 18 L.Ed. 819 (1867)). The *Shamrock Oil* Court determined that it was the clear intent of Congress to limit removal under § 71 to the original defendant. *Id.* at 106-07, 61 S.Ct. at 871. Surely Congress was just as clear in their intent when they added the "defendant or defendants" language to § 1441(a) but deleted it from the current version of § 1441(c).

Walker's § 1983 claims are separate and independent of the original accounting and conversion action. In *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534 (1951), this Court addressed the issue of what constituted a "separate and independent" claim for purposes of § 1441(c). The Court determined that "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)". *Id.* at 14, 71 S.Ct. at 540. Walker appears to rely on *American Casualty* for the proposition that the "single wrong to him - he lost his tenured faculty position" cannot constitute the separate and independent claim necessary for § 1441(c). *American Casualty* found in pertinent part that:

> [i]n making this determination we look to the plaintiff's pleading, which controls . . . The single wrong for which relief is sought is the failure to pay compensation for the loss on the property. Liability lay among three parties, but it was uncertain which one was responsible. Therefore, all were joined as defendants in one petition.

Id. at 14, 71 S.Ct. at 540. *American Casualty* was not a counter-claim action; the Court's focus was on the single wrong to the party seeking relief, the original plaintiff. *American Casualty* does not support Walker's implicit contention that, in determining whether the claims are separate and independent, this Court should look to his complaint only and ignore the original action by the original plaintiff, UTHSC. The original wrong forming the basis of the initial state court suit was the alleged conversion of funds belonging to UTHSC. Walker then sued over his termination. Whether Walker's due process rights were violated is answered by reviewing the process he received, not the outcome of the process (his termination), nor a derivative result of the process (the litigation to recover the lost funds). *E.g.*, *Heller v. Doe*, 509 U.S. 312, 332, 113 S.Ct. 2637, 2649 (1993).

Whether a third-party claim was "separate and independent" was addressed by the Fifth Circuit in *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury*, 622 F.2d 133 (5th Cir. 1980), in which the court made clear that the "a claim essentially seeking indemnity should be considered separate and independent" from the original complaint. *Id.* at 136. That is, the analysis was not artificially restricted to only the counter-plaintiff's complaint, but compared the original request for relief to the third-party indemnification requested relief.

This issue begins to resemble the one Walker presents in his petition: whether the federal claims in his counter-claim petition can be "joined" in the meaning of § 1441(c). Walker argues that only the original plaintiff can "join" a claim, and that only the original defendant can remove.[7] This argument, of course, elevates form over substance and has little authority in support.

---

[7] *American Casualty* does state that "the plaintiff's pleading . . . controls" whether the multiple claims are separate and independent, 341 U.S. at 14, 71 S.Ct. at 540, but there was only one complaint in *American Casualty*.

FED.R.CIV.P. 13(h) permits the "joinder" of additional parties as defendants to counter-claims. Rule 13(h) has been construed liberally to further the consolidation of related litigation into one suit. *Gentry v. Smith*, 487 F.2d 571, 579-80 (5th Cir. 1973); *United Artists Corp. v. Masterpiece Productions, Inc.*, 221 F.2d 213, 217 (2nd Cir. 1955); *Lesnick v. Public Indus. Corp.*, 144 F.2d 968, 973 (C.C.A.2 N.Y. 1944); *Hercules Incorp. v. Dynamic Export Corp.*, 71 F.R.D. 101, 105-06 (S.D. N.Y. 1976); Wright, Miller, Kane § 1434. Counter-claims seek affirmative relief. They are subject to FED.R.CIV.P. 8, and subject to potential dismissal under FED.R.CIV.P. 12 and 56. Until the adoption of 28 U.S.C. § 1367, they required an independent basis for jurisdiction. *Iglesias v. Mutual Life Insurance Company of New York*, 156 F.3d 237, 241 (1st Cir. 1998); *Channell v. Citicorp. National Services, Inc.*, 89 F.3d 379, 384 (7th Cir. 1996); Wright, Miller, Kane § 1422.

The Fifth Circuit held that although counter-defendants who were the original plaintiffs could not remove an action because such rationale would violate the well-pleaded complaint rule, counter-defendants who were not original plaintiffs would not violate the rule. *State of Texas v. Walker*, 142 F.3, 813, 816 (5th Cir. 1998). The Fifth Circuit determined that President Low, added in both his capacities as a counter-defendant by Walker, could remove the entire case pursuant to the rationale of *Carl Heck Engineers v. Lafourche Parish Police Jury*, 622 F.2d 133 (5th Cir. 1980).[8] In *Carl Heck Engineers* the court of appeals found that there was diversity between the third-party plaintiff and third-party defendant, and that the third-party indemnification claim was sufficiently separate and independent, and thus the case was removable pursuant to § 1441(c). The *Carl Heck Engineers* court discussed the authority to the contrary, which they characterized as arguing either that the third-party claim was "merely incidental

---

[8]The court of appeals assumed without deciding that the regents in their individual capacities were invalidated from removing because of their official capacity plaintiff status in the original action. 142 F.3d at 816.

or ancillary to the main claim and is not a separable controversy" or that it was "unjust" to allow a party the original plaintiff had not sued to determine the forum for the plaintiff's case. 622 F.2d at 135. The *Carl Heck Engineers* court determined that, as long as the third-party claim satisfied the separate and independent requirement of the statute and contained the basis for federal court jurisdiction, the action was removable. The Fifth Circuit in *State of Texas v. Walker* extended this logic to non-original plaintiffs such as President Low.[9]

Walker relies on *Thomas v. Shelton*, 740 F.2d 478 (7th Cir. 1984) and *Lewis v. Windsor Door*, 926 F.2d 729 (8th Cir. 1991), as well as the opinions of some commentators. Walker Petition at 5.

Thomas was originally a tort action in Indiana state court. Because the United States ultimately incurred the medical expenses at issue, it sued the defendant tortfeasor as well, in federal court, to recover its expenses. To avoid double liability, the defendant interpleaded the United States in the original state court action. The United States then removed the state court action to federal court and consolidated it with its own action against the defendant. The removing party in *Thomas* was a third-party defendant, unlike the case before the Court. Furthermore, unlike *Walker*, the third-party claims in *Thomas* were apparently state law tort claims, not federal questions. The *Thomas* court doubted that a third party defendant could ever remove under § 1441(c), because of the dependent nature of typical third-party claims means those claims are not "independent" and thus cannot be "joined" with the nonremovable claims of the original plaintiff.

---

[9]Respondents would suggest to the Court that allowing original-plaintiff counter-defendants to remove would not violate the well-pleaded complaint rule. The well-pleaded complaint rule addresses the search for federal jurisdiction in the complaint and rules out establishing jurisdiction in the defendant's answer or in anticipated defenses. *E.g., Franchise Tax Bd.*, 463 U.S. at 9-10, 103 S.Ct. at 2846. Nothing in the well-pleaded complaint rule mandates that it's locus is required to be on the original plaintiff's complaint.

Thomas, 740 F.2d at 486.[10] Of course, the *Thomas* court's observation regarding the faulty separate and independent nature of third-party claims, even if true, is inapplicable to counter-claims, which are not as constrained to issues of indemnity as third-party claims are. The *Thomas* court's concern over proper "joinder" of claims is less clear, though it appears that the court felt § 1441(c) required (in some unexplained and limited way) that the third party-claims be joined with the nonremovable claim of the original plaintiff. *Id.* See also 1A Moore's Federal Practice ¶ 0.167[10] (2nd ed. 1979)(cited in *Carl Heck Engineers*, 622 F.2d at 135).

Another concern of the *Thomas* court was that allowing removal of an action "the main part of which" was outside the court's jurisdiction would "enlarge federal jurisdiction at the expense of state jurisdiction in a rather dramatic way." *Thomas*, 740 F.2d at 486. This federalism concern seems misplaced in *State of Texas v. Walker*, as the $88 million dollar constitutional counter-claims Walker brought against the regents and President Low dwarf the original $90,000 action UTHSC brought in state court. The Eighth Circuit has adopted the reasoning of *Thomas*. *Lewis v. Windsor Door Co.*, 926 F.2d 729 (8th Cir. 1991).[11]

Neither *Thomas* nor *Lewis* discuss the rationale that would explain why it is proper to deny the counter-defendants who were not original plaintiffs their choice of a federal forum to defend themselves. Nor do they satisfactorily explain why it is unfair to

---

[10]The *Thomas* court acknowledges that the circuits and district courts are in conflict on the ability of third-party defendants to remove pursuant to § 1441(c). *Thomas*, 740 F.2d at 486 (citing *Ford Motor Credit Co. v. Aaron-Lincoln Mercury, Inc.*, 563 F.Supp. 1108, 1110 nn.6 & 8 (N.D. Ill. 1983) for a compilation of cases).

[11]At least one district court has applied *Thomas* to bar removal by counter-defendants. *Radio Shack Franchise Dept., A Division of Tandy Corp. v. Williams*, 804 F.Supp. 151 (D. Kan. 1992).

allow the original plaintiff to remove a federal question counter-claim.

Although it did not consider it, the *Franchise Tax Bd.* Court did note in passing the possibility of the argument at hand. The defendants below in *Franchise Tax Bd.* had filed a motion to dismiss in the district court, and suggested to the Court that it be considered as a counterclaim under the Employment Retirement Income Security Act of 1974 [28 U.S.C. §§ 1001 *et seq.*], and "which might then provide an independent jurisdictional basis for reaching the merits of the preemption issue in this case." *Franchise Tax Bd.*, 463 U.S. at 22 n.24, 103 S.Ct. at 2853 n.24 (citing *First Federal Savings and Loan Assoc. of Boston v. Greenwald*, 591 F.2d 417 (1st Cir. 1979), and *Wong v. Bacon*, 445 F.Supp. 1177, 1183-84 (N.D. Cal. 1977)).[12] There is no indication the Court accepted this invitation.

In summary, by treating Walker's § 1983 counter-claims as any other claim for relief in terms of removal jurisdiction under § 1441(c), federal courts would realize the "common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside." *Franchise Tax Bd.*, 463 U.S. at 20-21, 103 S.Ct. 2852 (quoting *Gully*, 299 U.S. at 117-18, 57 S.Ct. 99-100)).

---

[12]In *Greenwald*, the defendant removed claims against it brought under Massachusetts interest laws, arguing that its defense was primarily a question of federal law. The First Circuit, noting that the removal, pursuant to § 1441(b), may have been improvident under *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96 (1936), observed nonetheless that subsequent to removal the defendants had filed a counterclaim pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, and that the district court "clearly had jurisdiction over the associations' separate declaratory judgment action". 591 F.2d at 423. In *Wong*, the district court found federal question jurisdiction based upon the defendants' counterclaims. However, the suit was commenced in federal district court, so no removal question presented itself.

Nothing in § 1441(c) precludes a counter-claim defendant from exercising his right to a federal forum to defend federal claims.

II. THE COURT OF APPEALS VIEWED THE DISPUTED EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE NON-MOVANT WHEN IT AFFIRMED THE DISTRICT COURT'S GRANT OF QUALIFIED IMMUNITY

Walker asserts that the court of appeals (and, implicitly, the district court) determined disputed questions of material fact in the light most favorable to the movant, in contradiction to the well known standards of this Court. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986); *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). Walker provides this Court with no support for this conclusory allegation, which is contradicted by detailed factual determinations made by the district court. See Memorandum and Order of the District Court, State of Texas' Petition for Writ of Certiorari, Appendix at A27-A31.

Walker makes no contention in his Petition that the Fifth Circuit misapplied either qualified immunity law or substantive law. As public officials exercising discretionary functions, the regents and President Low are shielded from suit and from liability unless Walker can show that the constitutional rights the officials are accused of violating were clearly established at the time of the alleged offenses. *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S.Ct. 2727, 2732 (1982). The "touchstone" of this analysis is the objective reasonableness of the officials' conduct. *Anderson v. Creighton*, 483 U.S. 635, 637-41, 107 S.Ct. 3034, 3038-39 (1987). The current analytical framework for qualified immunity requires courts to determine, first, whether the plaintiff has a cognizable claim for deprivation of liberty or property interests without due process, and second, if so, whether that claim was clearly established under federal constitutional law in at the time. *Siegert*

v. Gilley, 500 U.S. 226, 231-233, 111 S.Ct. 1789, 1793-1794 (1991). So long as public officials of reasonable competence could differ on these issues, the defendants are immune from suit and liability. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986).[13]

It was undisputed that UTHSC determined that he owed the MSRDP $98,350, which was the most of all the faculty found to be in violation of the MSRDP agreement. See Memorandum and Order of the District Court, State of Texas' Petition for Writ of Certiorari, Appendix at A27-A31. It was undisputed that the other faculty cooperated with UTHSC and paid sizeable amounts to the MSRDP almost immediately. *Id.* It was undisputed that Walker was the only one who retained counsel and engaged in contentious negotiations with President Low. *Id.* It was undisputed that, even after negotiations, Walker only offered to pay $5,000 of the $98,350 estimate. *Id.* It was also undisputed that Walker was the only faculty member who resisted supplying UTHSC with an accounting of his earnings. *Id.*

Walker's Substantive Due Process Claims

Walker argues that the Fifth Circuit inappropriately resolved disputed facts regarding his substantive due process claims. Walker complains that the regents and President Low acted in an arbitrarily manner when they terminated him from his tenured faculty position at UTHSC, in violation of the Fourteenth Amendment's protection from arbitrary and capricious state action. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 220-23, 106 S.Ct. 507, 511-12 (1985). However, as detailed *supra*, the regents had plenty of evidence before them that would allow them to exercise their discretion and still apply professional and

---

[13]This Court's recent *Crawford-El v. Britton* decision is not applicable to the qualified immunity analysis of the substantive due process and rational basis equal protection claims in this case. _U.S. _, 118 S.Ct. 1584 (1998).

reasoned judgment. Most facts were not in dispute. Walker's argument is that his "offer" to settle, his "defense" that his bankruptcy erased most of his obligations to the MSRDP, and his "defense" that his subsequent licensing as an attorney shielded his professional earnings somehow created a question of material fact. The regents, however, were addressing the relatively undisputed situation that Walker alone was not forthcoming with information nor a reasonable remittance. As the court of appeals determined, Walker's "defenses" were not clearly established, and reasonable regents sitting in judgment could disagree as to their application to Walker's situation. The regents were not required by FED.R.CIV.P. 56 to show that there were no disputed issues before them when they considered Walker's termination.

Walker also claims that the mere fact that an administrative hearing tribunal at UTHSC had found in his favor created a fact question that the regents acted arbitrarily when they proceeded to terminate him nonetheless. UTHSC rejected the hearing tribunal's recommendation and put Walker's termination on the agenda of the board of regents. Memorandum and Order of the District Court, State of Texas' Petition for Writ of Certiorari, Appendix at A31. The regents held a hearing, heard from both Walker and the university, and, exercising their discretion, chose to agree with the institution and terminated Walker. As long as Walker received the process due under the Constitution, the clearly established law in the Fifth Circuit that it is not actionable to cite any deviation by the Board of Regents from the System's own rules and regulations. *Levitt v. University of Texas at El Paso*, 759 F.2d 1224, 1230-31 (5th Cir. 1985), *cert. denied*, 474 U.S. 1034, 106 S.Ct. 599 (1985). Moreover, it is not *per se* a violation of the Due Process Clause for the Regents to reject the findings and recommendations of an advisory hearing tribunal. *Kersey v. Shipley*, 673 F.2d 730, 733 (4th Cir. 1982), *cert. denied*, 459 U.S. 836, 103 S.Ct. 80 (1982); *Weiss v. Anker*, 421 F.Supp. 1040 (E.D.N.Y. 1976). Given the facts that were undisputed, *supra*, Walker presents this Court with no reason to disturb the Fifth

Circuit's determination that Walker's case presented the regents with a fact pattern that reasonable officials could disagree, and thus qualified immunity was proper. *State of Texas v. Walker*, 142 F.3d at 819 (citing *Malley*, 475 U.S. at 341, 106 S.Ct. at 1096).

Walker also complained that the regents' rejection of his discharge in bankruptcy defenses must be arbitrary behavior. *State of Texas v. Walker*, 142 F.3d at 819 n. 6. Walker never listed the State or UTHSC as a creditor in his bankruptcy, and the State never participated in his proceeding. UTHSC then filed the original action in state court for conversion and breach of contract, and Walker asserted his affirmative defense that whatever he owed UTHSC had been discharged in bankruptcy. *State of Texas v. Walker*, 142 F.3d at 820. UTHSC argued that his claims were non-dischargeable under 11 U.S.C. § 523. The district court granted Walker's motion for summary judgment on this issue.

The Fifth Circuit held that, as the nature of the law regarding his discharge claims was not clearly established, the UTHSC officials were entitled to qualified immunity. The court of appeals noted that "because the state was never notified of the bankruptcy and never had the opportunity to file a timely claim, bankruptcy law should ordinarily expressly protect the state's claim from being discharged." *Id.* at 822 & n.16. Once the court of appeals determined that the Eleventh Amendment did not prohibit the bankruptcy court from discharging a debt owed the state, the discharge could be raised by Walker as a defense to UTHSC's original state court action for conversion and breach of contract. *Id.* at 820. The court determined that a fact question existed as to whether Walker had engaged in "willful and malicious injury" as defined by 11 U.S.C. § 523(a)(6). Walker does not appeal this determination. The court of appeals also found that the state of the law was sufficiently unclear regarding these defenses that a reasonable official could have concluded that his obligations had not been discharged. *State of Texas v. Walker*, 142 F.3d at 819 n.6. The court of appeals addressed this issue extensively, *Id.* at

823-24, and Walker does not brief this Court as to why the court of appeals erred.

Walker's Equal Protection Claims

Finally, Walker complains that the court of appeals improperly determined fact questions in the movants' favor regarding his Equal Protection claims. Walker's Petition at 9. Specifically, Walker argues that the court of appeals (and, implicitly, the district court) decided disputed questions of material facts regarding whether he was similarly situated with other faculty at UTHSC.[14] *Id.* The district court determined, and it is undisputed, that Walker is not a member of any protected class. Memorandum and Order of the District Court, State of Texas' Petition for Writ of Certiorari, Appendix at A38 n.32. The district court dismissed this claim on that basis, citing *Woods v. Johnson*, 75 F.3d 1017, 1036 (5th Cir. 1996), *cert. denied*, _ U.S. _, 117 S.Ct. 150 (1996); and *Green v. McKaskle*, 788 F.2d 1116, 1125 (5th Cir. 1986). The Fifth Circuit affirmed, but on different grounds, determining that the rational basis test was appropriate for Walker's equal protection claims. *State of Texas v. Walker*, 142 F.3d at 819 (citing *Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997)). Based upon the undisputed facts before the district court, Walker was so far removed from the other colleagues who were found to be in violation of the MSRDP that he was simply not similarly situated. It was not difficult to show that the regents and President Low acted in an objectively reasonable manner when they undertook to terminate Walker, and the district court and the court of appeals properly found them to be entitled to qualified immunity for this claim.

---

[14]It is undisputed that he was the only medical school faculty member terminated at that time for failure to reimburse UTHSC for monies withheld from the MSRDP.

CONCLUSION

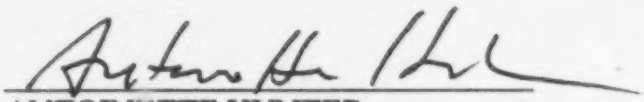
Removal of federal question counter-claims by counter-defendants was proper in this case. The court of appeals did not inappropriately resolved disputed issues of material fact. Walker's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DAVID A. TALBOT, JR.
Deputy Attorney General for Litigation



ANTOINETTE HUNTER
Chief, General Litigation Division
State Bar 10295900

RONALD R. DEL VENTO
Chief, Bankruptcy & Collections Division

CHRISTOPHER JOHNSEN
MARK BROWNING
Assistant Attorneys General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120

Counsel for Respondent

APPENDIX

TEXAS RULES OF CIVIL PROCEDURE

RULE 97. COUNTERCLAIM AND CROSS-CLAIM

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(f) Additional Parties. Persons other than those made parties to the original action may be made parties to a third party action, counterclaim or cross-claim in accordance with the provisions of Rules 38, 39 and 40.

RULE 38. THIRD-PARTY PRACTICE

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party petition not later than thirty (30) days after he serves his original answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action. The person served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim under the rules applicable to the defendant, and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 97. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the

plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses and his counterclaims and cross-claims. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or who may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) This rule shall not be applied, in tort cases, so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract liable to the person injured or damaged.

(d) This rule shall not be applied so as to violate any venue statute, as venue would exist absent this rule.

RULE 39. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to Be Joined if Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (I) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring

double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 42.

RULE 40. PERMISSIVE JOINDER OF PARTIES

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the

action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all other relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

UNITED STATES CODE ANNOTATED
TITLE 11 BANKRUPTCY

§ 523. EXCEPTIONS TO DISCHARGE

(a) A discharge under section 717, 1141,, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit --

(A) If such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a

proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.